Interior to "prosecute" the plan "as speedily as may be consistent with budgetary requirements." § 9(a), 58 Stat. 891, App. 97. Nothing in this language assigned the Corps priorities for subsequent dam management.

The Eighth Circuit's method of interpretation is particularly troubling because it did not use legislative history to interpret statutory text. Instead, the court construed a statutory mandate out of a kind of floating legislative purpose that did not give meaning to any actual statutory language cited by the court. Members of this Court have disagreed at times about the value of legislative history, but all have agreed that its value is limited at most to help in interpreting statutory terms. *See Exxon Mobil Corp. v Allapattah Servs.*, 125 S Ct 2611, 2626 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). *Compare Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (Scalia, J., concurring) ("The *only* reliable indication of [legislative] intent -- the only thing we know for sure can be attributed to *all* of them -- is the words of the bill that they voted to make law.") (citations and footnotes omitted) *with* Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 S. Cal. L. Rev. 845, 863 (1992) (defending use of legislative history "in trying to understand the meaning of the words that do make up the statute").

The Eighth Circuit even went so far as to elevate the purpose it gleaned from legislative history over contrary purposes set forth in actual statutory text. The 1944 Act included introductory language that expressed the intent "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated

consistently with appropriate and economic use of the waters of such rivers by other users." 58 Stat at 888, App. 90 (emphasis supplied). The statutory text itself therefore expressed Congress's intent to support navigation only to the extent it was consistent with other appropriate economic uses. That directly contradicts the Eighth Circuit's ruling below that Congress did not permit "priority of interests under the FCA to shift according to their relative economic value." App. 17.[4]

Indeed, even if the Eighth Circuit had found the statute ambiguous, the remedy was not to journey through the legislative history but to defer to the Corps' construction. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In the final EIS for the 2004 Master Manual, the Corps found that Congress had not defined any "standard of any kind for management of the recommended purposes" other than its identification of the system's broad purposes, "among them being flood

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[4] The Eighth Circuit's use of legislative history in this case exemplifies how excessive reliance on legislative history can be, in the famous phrase of Judge Leventhal, "an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp.*, 125 S. Ct. at 2626 (citation omitted). While the Eighth Circuit inferred a dominant purpose from the limited evidence of their unanimous order of listing in legislative reports -- a factual assertion that was itself incorrect as shown below-- it declined to find significance in a large number of quotations in those same reports stating that the Corps should balance the purposes to maximize benefits. *See Ubbelohde*, 330 F.3d at 1030 (refusing to credit statements in project reports that the plan "will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation" and "will be operated for maximum multiple purpose use.").

control, irrigation, navigation, power, fish and wildlife, and recreation." J.A. X:7986. See discussion below at App. 16 n. 7. Principles of deference therefore also call for an equal balancing of the different project goals.

To the Court below, Congressional expectations were the equivalent of statutory mandates regardless of statutory language. Such a view, if applied more broadly, would freeze the management of public infrastructure by requiring agencies to manage them according to original expectations even when economic conditions change dramatically. This case is important because the Eighth Circuit's failure to follow this court's rules of statutory interpretation has serious implications for the rational management of aging public investments.

CONCLUSION

Between them, this petition and the petition in case number 05-631 will determine if management of the Missouri River can evolve to reflect changed economic and environmental needs. For the foregoing reasons, this Court should grant both petitions for certiorari and consolidate them for argument.

Respectfully submitted,

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No. 05-611

In The Supreme Court of the United States

STATE OF NORTH DAKOTA and
STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT BRIEF OF THE STATE OF NEBRASKA AND THE NEBRASKA PUBLIC POWER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, the State of Nebraska and the Nebraska Public Power District (collectively, the "Joint Respondents") submit this Joint Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by the State of North Dakota and the State of South Dakota (together, the "Dakotas").

The Dakotas once again ask this Court to second guess the wisdom of congressional policy established in the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944). The Court earlier declined to do so when it denied the Dakotas' petition for writ of certiorari from the Eighth Circuit Court of Appeals' decision in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), cert. denied *North Dakota v. Ubbelohde*, 514 U.S. 987, 124 S.Ct. 2015 (2004). Consistent with *Ubbelohde*, and this Court's decision in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 108 S.Ct. 805 (1988), the Court of Appeals held that the Flood Control Act embodies congressional design to prioritize flood control and navigation over other, secondary functions served by the Missouri River mainstem reservoirs. There is no basis for the Dakotas' second request to revisit this issue. The Petition should be denied.

OBJECTION TO CONSIDERATION OF THE QUESTION PRESENTED

Pursuant to Supreme Court Rule 15.2, the Joint Respondents object to the Dakotas' portrayal of this matter as a dispute between upstream recreation interests and a "marginally economic, downstream navigation industry." Petition at 2. Respondents also object to the

Dakotas' attempt to revisit an issue already decided as explained below. The Question Presented is whether flood control and navigation are the dominant functions of the reservoirs on the mainstem of the Missouri River. As the Petition recognizes, this issue was decided in *ETSI* and *Ubbelohde*.[1]

STATEMENT OF THE CASE

I. THIS CASE IS NOT ABOUT EQUITABLY APPORTIONING THE WATERS OF THE MISSOURI RIVER.

As a preliminary matter it is important to recognize what this case is not. The Petition offers: "Certiorari is warranted because this case, at its heart, is an inter-state dispute over properly allocating water in a major river" that is "akin to the equitable apportionment cases the Court often hears under its original jurisdiction." Petition at 24. This Court has explained:

> Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream. *Kansas v. Colorado*, 206 U.S. 46, 98, 27 S.Ct. 655, 667-668, 51 L.Ed. 956 (1907); *Connecticut v. Massachusetts*, 282 U.S.

[1] *Compare* Petition at 11 ("Also that summer [2003], the Eighth Circuit issued a decision on the Corps' appeal of the 2002 injunctions. *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003). Relying primarily on *ETSI Pipeline*, the court ruled that while the 1944 Flood Control Act requires the Corps to balance all uses, it gives navigation a priority. *Id.* at 1019-20.) *with* Petition at 12 ("On appeal [in the instant matter], however, the Eighth Circuit gave downstream navigation a priority, describing it as a 'dominant function.' *Ubbelohde*, 330 F.3d at 1019-20.").

660, 670-671, 51 S.Ct. 286, 289-290, 75 L.Ed. 602 (1931). It is a flexible doctrine which calls for "the exercise of an informed judgment on a consideration of many factors" to secure a "just and equitable" allocation. *Nebraska v. Wyoming*, 325 U.S. 589, 618, 65 S.Ct. 1332, 1350-1351, 89 L.Ed. 1815 (1945). We have stressed that in arriving at "the delicate adjustment of interests which must be made," *ibid.*, we must consider all relevant factors, including:

> "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former." *Nebraska v. Wyoming*, 325 U.S. 589, 618, 65 S.Ct. 1332, 1351, 89 L.Ed. 1815 (1945).

Colorado v. New Mexico, 459 U.S. 176, 183, 103 S.Ct. 539, 545 (1982).

This case does not involve claims among or between the States in the Missouri River Basin. Nor does it involve "federal common law." The only "relevant factor" involved in this matter is congressional intent embodied in the Flood Control Act and the underlying "Pick" and "Sloan" Plans, as reconciled by Congress in 1944.[2] This case is

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[2] The Flood Control Act approved a compromise of comprehensive plans for projects proposed by the Secretary of War on one hand (the "Pick Plan," *see* H.R. DOC. NO. 475, 78th Cong., 2d Sess. (1944)), and by the Secretary of the Interior on the other (the "Sloan Plan," *see* S. DOC.

(Continued on following page)

about the United States Army Corps of Engineers' ("Corps") obligations under the Flood Control Act and the manner in which Congress directed the Corps to operate the dams under its control on the Missouri River. As explained next, when the Corps attempted to depart from that direction, the Eighth Circuit was forced to correct the Corps' course. It is the Eighth Circuit's interpretation of a Federal agency's obligations under a Federal statute with which the Dakotas quibble. This case does not resemble remotely those in which this Court exercises its original jurisdiction to resolve interstate disputes.

II. MISSOURI RIVER MAINSTEM DAM AND RESERVOIR MANAGEMENT.

In 1944, Congress explained: "The water of the Missouri River system is a primary national resource which, up to the present time, has been inadequately controlled and developed." S. DOC. NO. 191 at 10. To that end, Congress enacted the Flood Control Act, authorizing the construction and operation of dams and reservoirs on the mainstem of the Missouri River by the Corps.[3] This Court previously determined that flood control and navigation are the "dominant function" of those reservoirs. *ETSI*, 484 U.S. at 512, 108 S.Ct. at 815. In addition, the mainstem dam and reservoir system provides a wide range of benefits to each of the Missouri River Basin states. Additional authorized project purposes include water supply, power

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NO. 191, 78th Cong., 2d Sess. (1944)). The compromise report is S. DOC. NO. 247, 78th Cong., 2d Sess. (1944).

[3] The Dakotas incorrectly state that all five reservoirs are located within their borders. Petition at 4. One of the dams, Gavins Point, is located in both South Dakota and Nebraska.

generation, irrigation, recreation and fish and wildlife. *E.g.*, S. DOC. NO. 247 at 3.

Contrary to the Dakotas' characterization, this matter does not simply pit the downstream navigation industry against upstream recreation interests in the Dakotas. *E.g.*, Petition at 2. By way of illustration, the National Academy of Sciences highlighted the importance of the Missouri River as a source of water supply for municipal and industrial uses. NATIONAL ACADEMY PRESS, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY (2002).[4] The water supply benefits of the Missouri River "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic, and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 93. In 1994, for instance, the Corps found $571.6 million in annual benefits (i.e., cost savings) from the withdrawal of water from the Missouri River. *Id.* Hydropower benefits, measured by the costs of alternative supplies, have an annualized value of $615 million. *Id.* at 97. The Basin has received an estimated $18 billion in total flood damage prevented as of 1998. *Id.* at 99. While flood control and navigation are the "dominant" function of the mainstem reservoirs, the Corps' service of those purposes supports the extensive infrastructure that developed around the flow regime maintained by the Corps under the traditional interpretation of the Flood Control Act's priorities.

To implement the provisions of the Flood Control Act, the Corps adopted regulations in accordance with Section

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[4] The National Academy of Sciences' Report is reproduced in the Joint Appendix filed with the Court of Appeals at pp. 5027-5120.

7 of that Act, now codified at 33 U.S.C. § 709, requiring the establishment of "water control plans" for all Corps projects, and the preparation of "master manuals" where several projects within a drainage have interrelated purposes. 33 C.F.R. § 222.5(a) & (i)(2). The Corps adopted the Missouri River Mainstem Reservoir System Reservoir Regulation Manual ("Master Manual") in 1960. The Corps revised the Master Manual in 1975, 1979 and most recently in 2004. Master manuals are intended to set forth the regulatory framework by which the Corps will achieve the multiple purposes for which the dams and reservoirs were created.

III. EVOLUTION OF THE QUESTION PRESENTED.

The Dakotas seek review of a footnote in the Court of Appeals' opinion explaining the relative priority of the mainstem reservoirs. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 629, n.7 (8th Cir. 2005). Therein the court explained, in material part:

> The Corps states in § 7-01 of the 2004 Master Manual that in the FCA, "Congress did not assign a priority to these purposes" of "flood control, navigation, irrigation, hydropower, . . . recreation, and fish and wildlife. . . . " To the contrary, as we clearly stated in *Ubbelohde*, the FCA has been interpreted to hold flood control and navigation dominant and recreation, fish and wildlife secondary. *Ubbelohde*, 330 F.3d at 1019-20.

421 F.3d at 629, n.7.

The Court of Appeals reiterated this point of law because when revising the 2004 Master Manual,[6] the Corps – in a striking departure from prior versions of the Master Manual – proclaimed for the first time in an official rulemaking that the Flood Control Act authorized the Corps to serve the functions of the mainstem reservoirs on a relative priority the Corps saw fit to establish. Ignoring the Eighth Circuit's holding in *Ubbelohde*, the Corps contended that the Flood Control Act afforded no priority to flood control or navigation. The Dakotas supported the Corps' interpretation and this provision in the 2004 Master Manual.

The Joint Respondents challenged the Corps' interpretation of the Flood Control Act as set forth in the 2004 Master Manual. The district court ruled in favor of the Corps, and the Joint Respondents appealed the issue to the Eighth Circuit. The Joint Respondents contended that Congress established flood control and navigation as the dominant functions of the mainstem Missouri River reservoirs and that *Ubbelohde* foreclosed further debate on the matter. The Court of Appeals ruled in favor of the Joint Respondents on this point.

In disposing of the Dakotas' contention that the Corps was entitled to adjust priorities under the Flood Control Act, the Court of Appeals explained that "[n]othing in the text or legislative history of the FCA suggests that Congress

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[6] The official title of this document is the MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM, MASTER WATER CONTROL MANUAL (2004). The Master Manual was promulgated pursuant to Section 7 of the Flood Control Act and 33 C.F.R. § 222.5. The Master Manual is a binding rule that governs the Corps' operation of the reservoirs on the mainstem of the Missouri River. *Ubbelohde*, 330 F.3d at 1029.